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DEPARTMENT OF ECOLOGY  
OFFICE OF DIRECTOR

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

THE PORT OF SEATTLE,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY,

Respondent.

PCHB NO. 07-028

WSDOT'S PETITION TO INTERVENE

I. PETITION

The Washington State Department of Transportation (WSDOT) hereby petitions the Pollution Control Hearings Board (Board) for an order allowing it to intervene in the above-captioned appeal of the Washington State Department of Ecology's (Ecology) Phase I Municipal Stormwater Permit issued on January 17, 2007 (the Permit). This Petition is made pursuant to WAC 371-08-420, WAC 371-08-450, and CR 24 and is supported by the attached Declaration of Megan White.

WSDOT requests that the Board decide this Petition on WSDOT's written submissions, unless the Petition is opposed. If any party opposes, WSDOT requests the opportunity for oral argument before or during the Prehearing Conference. WSDOT has

1 contacted the parties and awaits a response from one or more parties regarding concurrence or  
2 opposition.

3 WSDOT specifically requests permission to participate in the Prehearing Conference  
4 as an Intervenor.

## 5 II. INTERVENOR

6 WSDOT is an agency of the State of Washington which owns, operates, and maintains  
7 the state highway system, including many storm drainage systems statewide. This Petition is  
8 brought by the Office of the Attorney General, State of Washington.

9 WSDOT's contact information is:

10 Washington State Department of Transportation  
11 Environmental Services Office  
12 Attn: Megan White, Director  
13 310 Maple Park Avenue S.E.  
14 P.O. Box 47331  
15 Olympia, WA 98504-47331

16 Phone: (360) 705-7480  
17 Facsimile: (360) 705-6833

18 Counsel for WSDOT is:

19 Stephen Klasinski  
20 Assistant Attorney General  
21 Transportation & Public Construction Division  
22 P.O. Box 40113  
23 Olympia, WA 98504-0113

24 Phone: (360) 753-4051  
25 Facsimile: (360) 586-6847

## 26 III. STATEMENT OF FACTS

Ecology issued the Phase I Municipal Stormwater Permit on January 17, 2007, with an  
effective date of February 16, 2007 (Permit). A copy of the Permit is appended to the Notice  
of Appeal. The Permit regulates municipal stormwater discharges of the Permittees identified  
in the Permit. The named Permittees include the City of Tacoma, the City of Seattle, Clark  
County, King County, Pierce County, and Snohomish County. The Port of Seattle and the

1 Port of Tacoma are identified as Secondary Permittees. A number of the permittees and a  
2 couple of public interest groups have appealed the Permit on various grounds.

3 WSDOT owns and operates storm drainage systems regulated under the Clean Water  
4 Act's NPDES permit program as they meet the definition of Municipal Separate Storm Sewer  
5 Systems. WSDOT was a named permittee of the previously issued Phase I Municipal  
6 Stormwater Permit, but is not a named permittee under the Permit on appeal. Instead,  
7 WSDOT is working with Ecology on the development of its own municipal stormwater  
8 permit. The issuance of this permit, initially scheduled to be issued concurrently with  
9 reissuance of the permit under appeal, has been postponed. See the Declaration of Megan  
10 White.

11 Many of the provisions to be included in WSDOT's permit are substantially similar or  
12 even identical with those in the Permit being appealed. The outcome of these appeals will  
13 undoubtedly set precedent for similar provisions in WSDOT's permit. However, WSDOT's  
14 interest and circumstances vary from those of the named Permittees. Consequently, WSDOT  
15 needs to intervene in these appeals to provide its particular perspective to any litigation or  
16 settlement talks that evolve. See the Declaration of Megan White.

#### 17 IV. AUTHORITIES AND ARGUMENT

18 The Board should approve WSDOT's Petition as an intervention of right or, in the  
19 alternative, a permissive intervention. WSDOT holds a direct and substantial interest in the  
20 subject permit and the outcome of these appeals and is so situated that the disposition as a  
21 practical matter very well may impair or impede its ability to protect its interest in its own  
22 permit. In addition, no other existing party can adequately represent WSDOT in these  
23 appeals. Finally, WSDOT's interests in the development of its own permit have numerous  
24 questions of law and fact in common with those being decided in these appeals.

1 **A. WAC 371-08-420.**

2 WAC 371-08-420 governs intervention in proceedings before this Board. That rule  
3 provides:

- 4 (1) The presiding officer may grant a petition for intervention at any time,  
5 upon determining that the petitioner qualifies as an intervenor pursuant to  
6 civil rule 24, that the intervention will serve the interests of justice and that  
7 the prompt and orderly conduct of the appeal will not be impaired.
- 8 (2) The presiding officer may impose conditions upon the intervenor's  
9 participation in the proceedings.

10 **B. Civil Rule 24.**

11 Civil Rule (CR) 24 provides for two types of intervention, intervention of right  
12 and permissive intervention. WSDOT qualifies for intervention under either category.

13 **1. Intervention of Right.**

14 CR 24(a) governs intervention of right and provides:

- 15 (a) Intervention of Right. Upon timely application anyone shall be permitted  
16 to intervene in an action: (1) when a statute confers an unconditional right  
17 to intervene; or (2) when the applicant claims an interest relating to the  
18 property or transaction which is the subject of the action and he is so  
19 situated that the disposition of the action may as a practical matter impair  
20 or impede his ability to protect that interest, unless the applicant's interest  
21 is adequately represented by existing parties.

22 In Westerman v. Corey, 125 Wn.2d 277, 303, 892 P 2d 1067 (1994), the Supreme  
23 Court stated that CR 24 provides a four-part test for intervention of right.

24 This rule thus imposes four requirements that must be satisfied before  
25 intervention must be granted: (1) timely application for intervention; (2) an  
26 applicant claims an interest which is the subject of the action; (3) the applicant is  
so situated that the disposition will impair or impede the applicant's ability to  
protect the interest; and (4) the applicant's interest is not adequately represented  
by the existing parties.

27 **a. Timeliness.** The Board has not yet conducted the Prehearing  
28 Conference, set a schedule, heard arguments, or taken testimony. WSDOT's intervention in  
29 these proceedings will not delay the orderly process of these hearings in any manner. The  
30 Petition is timely.

1           **b.     WSDOT's Interest.** WSDOT's yet to be issued permit will regulate its  
2 stormwater systems in a manner substantially similar or even identical with the permit being  
3 appealed. The Board's factual determinations and legal conclusions will serve as binding  
4 precedent and will thus directly affect the issuance of WSDOT's permit. WSDOT has a direct  
5 interest in the outcome of these appeals.

6           **c.     Impairment of WSDOT's Interest.** As an applicant for a stormwater  
7 permit that will be substantially similar and, in some respects, identical with that being  
8 appealed, WSDOT is so situated that disposition of these appeals very well may determine the  
9 outcome of its permit. Consequently, WSDOT's interests will be impaired unless it is allowed  
10 to intervene and participate in these proceedings.

11           **d.     Inadequate Representation.** WSDOT operates stormwater systems  
12 statewide under a variety of conditions. Its circumstances are, at least in some instances, quite  
13 different than those of a county, city, or port. See the Declaration of Megan White. Although  
14 WSDOT agrees to a large degree with Ecology's approach, Ecology is the regulatory agency  
15 and cannot adequately represent the interests of WSDOT, a regulated agency. WSDOT is the  
16 only party to these appeals that can adequately represent its interests.

17           **2.     Permissive Intervention.**

18           CR 24(b) governs permissive intervention and provides:

19           **(b)     Permissive Intervention.** Upon timely application, anyone may be  
20 permitted to intervene in an action: (1) When a statute confers a  
21 conditional right to intervene; or (2) When an applicant's claim or defense  
22 and the main action have a question of law or fact in common. When a  
23 party to an action relies for ground of claim or defense upon any statute or  
24 executive order administered by a federal or state governmental officer or  
25 agency or upon any regulation, order, requirements, or agreement issued  
26 or made pursuant to the statute or executive order, the officer or agency  
upon timely application may be permitted to intervene in the action. In  
exercising its discretion the court shall consider whether the intervention  
will unduly delay or prejudice the adjudication of the rights of the original  
parties.

1 WSDOT's yet to be issued permit will include provisions that will be substantially  
2 similar or even identical with those under appeal here. While in some instances WSDOT's  
3 circumstances might have somewhat different nuances, the factual determinations to be made  
4 in these appeals involve matters in common with those in WSDOT's permit. In addition,  
5 WSDOT's permit will be governed by the same federal and state statutes and rules involved in  
6 these appeals. WSDOT's claims and defenses share much in common with those being  
7 litigated in these appeals.

8 WSDOT's intervention at this time will not delay these proceedings as they are in a  
9 preliminary state. Nor will the rights of any original parties be prejudiced. This Board should  
10 exercise its discretion and permit intervention.


#### 11 V. CONCLUSION

12 WSDOT respectfully requests the Board grant its Petition to Intervene. WSDOT has a  
13 direct and substantial interest in the outcome of these appeals and is so situated that the  
14 disposition will as a practical matter impair or impede its ability to protect its interests in the  
15 issuance of its own permit. No other party can adequately represent WSDOT's interests.  
16 WSDOT's interests share questions of fact and law in common with those being decided in  
17 these appeals. The petition is timely, and intervention will not unduly delay or prejudice the  
18 adjudication of the rights of the original parties.

19 WSDOT requests that its petition be decided on its written submissions unless the  
20 petition is opposed, in which case WSDOT requests oral argument. Pursuant to  
21 WAC 371-08-450, WSDOT will submit a proposed order if such is requested by the presiding  
22 officer.

1 DATED this 5<sup>TH</sup> day of April, 2007.

2 ROBERT M. MCKENNA  
3 Attorney General

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5 **STEPHEN KLASINSKI, WSBA# 11419**  
6 Assistant Attorney General  
7 Attorney for Respondent  
8 WASHINGTON STATE DEPARTMENT OF  
9 TRANSPORTATION  
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